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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of AT&T Corporation and Tele-Communications, Inc. Applications for Transfer of Control	)	CS Docket No. 98-178

COMMENTS OF ECHOSTAR COMMUNICATIONS CORPORATION

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SUMMARY

EchoStar Communications Corporation ("EchoStar") hereby submits its Comments in the above-captioned proposal to transfer control of Tele-Communications, Inc. ("TCI") to AT&T Corporation ("AT&T").[1] EchoStar is a Direct Broadcast Satellite ("DBS") distributor that currently competes against TCI in the market for multi-channel video programming distribution ("MVPD") services.[2] In these comments, EchoStar requests that the Commission carefully examine the effects that the proposed merger will have on competition in that evolving market and impose appropriate remedial conditions. Specifically, the proposed transfer will enable the combined entity to provide consumers with an integrated package that will combine traditional video, news, information and entertainment with a cornucopia of real-time interactive services to be delivered through an exclusively-controlled broadband "pipe" to the home. Because similar broadband access will be unavailable to other distributors at least in the short term, TCI's current competitors in the MVPD market will be unable to complement their own offerings with similar advanced services.

TCI/AT&T's exclusive control over the broadband pipe to the home would be a sufficiently serious anti-competitive concern standing alone – indeed Congress and the Commission have unmistakably expressed their belief in the importance of uninhibited access by Americans to advanced services. This concern becomes even more serious when that bottleneck control over broadband capacity is viewed in the context of the MVPD market and TCI's

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1 *See* AT&T and TCI Applications for Proposed Transfers of Control (filed Sept. 14, 1998).

2 EchoStar's status as a competitor of TCI makes EchoStar a "party in interest" under the Communications Act, 47 U.S.C. § 309(d)(1), and the Commission's precedent.

willingness and ability to combine these advanced services with its current video offerings. That control will further exacerbate TCI's existing market power in that market, and will work to frustrate the Commission's hopes that DBS distributors will one day manage to dent that power.

In order to prevent such an anti-competitive outcome, EchoStar requests that the Commission require, as a condition of its approval, a commitment by AT&T and TCI to provide access to their digital broadband bottleneck resources (including inside wiring in Multiple Dwelling Units) to all MVPD competitors on reasonable terms and conditions for the provision of advanced services complementing these distributors' video programming packages and in a manner that will allow DBS distributors to integrate services offered over that plant with their satellite MVPD packages.[3] The applicants should also agree to submit to the Commission's jurisdiction to prescribe reasonable terms in the event of failure to agree on these terms with an MVPD competitor. The Commission should consider lifting the conditions periodically – for example, a triennial review process – depending on the future emergence of alternative sources of broadband access available to MVPD distributors. Nevertheless, even when broadband capacity does become available to such distributors from other sources (like Ka-band satellite systems), AT&T/TCI will still possess exclusive control over the inside wiring that will be necessary to provide interactive broadband services in Multiple Dwelling Units. Thus, even if the Commission were to lift the requested condition in the future, it should keep in place a requirement that, where feasible, AT&T/TCI make available their inside wiring to MVPD competitors on reasonable terms and conditions.

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[3] EchoStar believes that the technology is available for a satellite/terrestrial integrated offering that will be seamless from the perspective of the consumer.

In addition, the Commission should impose several restrictions on AT&T/TCI's packaging and marketing of MVPD services together with advanced and telephone services. Thus, the combined entity should be barred from imposing exclusivity requirements on consumers. It should be required to also make available to consumers MVPD, advanced and phone services on a separate, unbundled basis, thus allowing consumers to turn to other distributors for their MVPD needs. It should likewise be barred from imposing any direct or indirect restrictions that inhibit an AT&T/TCI customer from subscribing to another MVPD distributor or that provide the customer with built-in disincentives to do so (such as unwarranted price differentials between packaged and unbundled AT&T/TCI offerings, difficulty of integrating AT&T/TCI advanced services with another MVPD product, etc.).

Finally, to safeguard the integrity of its program access rules, the Commission should clarify that TCI's current programming arm, the Liberty Media Group ("Liberty Media"), will be considered an affiliate of the merged entity under the Commission's attribution standard for cable operators and programmers. Liberty is now perhaps the largest vertically integrated programming vendor in the country and is thus indisputably subject to the program access rules. TCI and AT&T contend that they have structured the merger so as to separate Liberty Media's businesses from AT&T's other businesses. Whether or not this portends an effort to evade application of the Commission's rules, any doubtful operational independence that Liberty Media will enjoy simply does not alter the fact that it is a wholly-owned subsidiary of the merged entity and should continue to be treated as a vertically integrated programming vendor for purposes of the Commission's program access provisions.

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To: The Commission

COMMENTS OF ECHOSTAR COMMUNICATIONS CORPORATION

EchoStar Communications Corporation ("EchoStar") hereby submits its Comments in the above-captioned proposal to transfer control of Tele-Communications, Inc. ("TCI") to AT&T Corporation ("AT&T").[1] EchoStar is a Direct Broadcast Satellite ("DBS") distributor that currently competes against TCI in the market for multi-channel video programming distribution ("MVPD") services.[2] In these comments, EchoStar requests that the Commission carefully examine the effects that the proposed merger will have on competition in that evolving market and impose appropriate remedial conditions. Specifically, the proposed

[1] *See* AT&T and TCI Applications for Proposed Transfers of Control (filed Sept. 14, 1998).

[2] EchoStar's status as a competitor of TCI makes EchoStar a "party in interest" under the Communications Act, 47 U.S.C. § 309(d)(1), and the Commission's precedent.

transfer will enable the combined entity to provide consumers with an integrated package that will combine traditional video, news, information and entertainment with a cornucopia of real-time interactive services to be delivered through an exclusively-controlled broadband "pipe" to the home. Because similar broadband access will be unavailable to other distributors at least in the short term, TCI's current competitors in the MVPD market will be unable to complement their own offerings with similar advanced services.

I. THE COMMISSION SHOULD CONDITION APPROVAL OF THE PROPOSED MERGER ON AN AT&T/TCI COMMITMENT TO AFFORD OPEN ACCESS ON REASONABLE TERMS TO ITS BROADBAND CAPACITY FOR COMPETING MVPD PROVIDERS

It is well-established that TCI, the nation's largest Multiple System Operator, has market power in the MVPD market for its cable franchise areas. As the Commission has recently noted, "incumbent cable television systems now pass virtually every home in this country and provide cable television services to approximately 66% of them."[3] The Commission's 1998 MVPD Market Report notes that "[l]ocal markets for the delivery of video programming generally remain highly concentrated and continue to be characterized by some barriers to entry and expansion by potential competitors to incumbent cable systems."[4] Indeed, cable operators' market share of MVPD subscribers remains extremely high at 87%.[5] TCI's

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[3] *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, Notice of Inquiry, CC Docket No. 98-146, ¶ 39 (rel. Aug. 7, 1998) ("*Advanced Services NOI*").

[4] *In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, Fourth Annual Report, 13 FCC Rcd. 1034, ¶ 11 (1998) ("1998 Cable Report").

[5] 1998 Cable Report, ¶ 11.

systems alone pass at least 20.9 million homes.[6] Since the passage of the 1992 Cable Act, both Congress and the Commission have expressed concern with this festering situation and have sought to loosen the cable operators' grip and promote effective competition in the market. Indeed, one of the principal aims of the 1992 Act was to promote such competition: "It is the policy of the Congress in this Act to . . . (5) ensure that cable television operators do not have undue market power vis-a-vis video programmers and consumers."[7] In light of TCI's market power, any transaction involving the acquisition of that company must be reviewed very carefully for any further anti-competitive consequences in that market.

As it happens, the proposed transaction threatens to *augment* and *cement* that market power if left unconditioned. This is because AT&T/TCI will complement TCI's traditional video packages with advanced high-speed, high-bandwidth services that it will exclusively provide to MVPD consumers. That is the vision that TCI and AT&T propose to implement: "the Merger Parties plan to be the first fully-integrated residential communications services provider with a national product including the ability to provide long distance, video, local, wireless, Internet and other data services on a packaged, as well as individualized basis."[8] Indeed, according to the applicants, such integrated services cannot be implemented but for this transaction. In the words of TCI's Chairman Dr. John Malone: "[the merger] was the only way TCI could reach its goals [of developing a broadband network] in my lifetime. To implement the

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6 AT&T-TCI Applications at 6.

7 Cable Television Consumer Protection and Competition Act of 1992, Public Law 102-385, 106 Stat. 1460, Section 2(b)(5) (1992).

8 AT&T-TCI Applications at 39.

communications part of our strategy we needed a massive partner. In talks with AT&T, it became clear there was no way of doing it without putting the companies together."[9]

The advanced services that this deal would add to TCI's current conventional video services are themselves of paramount importance to consumers. As the Commission itself has noted, "demand for more "broadband" or "high-speed bandwidth" is increasing exponentially."[10] Indeed, "[t]he ability of all Americans to access these networks, and to share in their resources, will very likely spur our growth and development as a nation."[11] Accordingly, assuring such access has become an important congressional and FCC goal.[12] And, as both Congress and the FCC have acknowledged, the key to reaching this goal is to ensure that the developing market for these integrated services is vibrant and competitive.[13] Thus, the Commission has recognized the anti-competitive significance of controlling – and thus potentially limiting – consumers' access to integrated, broadband services. In its recent *Advanced Services Order*, the Commission held that all incumbent local exchange carriers are

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9 *AT&T Targets Consumer Local Access Through TCI Acquisition*, ComputerWire, Inc. Network Briefing (June 25, 1998). *See also* AT&T/TCI Applications at 32 ("As a result of the Merger, within the next several years, AT&T likely will be able to provide packaged (and separate) voice and video services to residential consumers."). *See id.* at 36 ("With respect to Internet services, the Merger should create a stronger participant that will provide new and differentiated services in an effort to challenge the more established competitors.").

10 *Advanced Services NOI*, ¶ 2.

11 *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Memorandum Opinion and Order, and Notice of Proposed Rulemaking, CC Docket No. 98-147, ¶ 7 (rel. Aug. 7, 1998) ("*Advanced Services Order*").

12 *See* 47 U.S.C. § 706 (directing the Commission to examine the availability of advanced telecommunications capability to all Americans). *See generally Advanced Services NOI* (fulfilling this directive).

13 *See* 47 U.S.C. § 706(b); *Advanced Services NOI*, ¶ 7.

required to provide access to any high-speed networks that they implement. In doing so, the Commission stated:

> We agree . . . that, if we are to promote the deployment of advanced telecommunications capability[14] to all Americans, competitive LECs must be able to obtain access to incumbent LEC XDSL-capable loops on an unbundled and nondiscriminatory basis.[15]

For their part, the DBS distributors competing against TCI, including EchoStar, do not have any type of broadband access to consumer homes and cannot complement their current one-way video offering to counter the integrated interactive package that the proposed transaction will make possible. Nor can they look elsewhere: alternative technologies for securing such access are not expected to be widely deployed in the near future. As the Commission is aware, the only other incumbents with terrestrial communications facilities to the home (local telephone companies) have been extremely slow to deploy xDSL loops;[16] even when they do, it is questionable whether they will be available to unaffiliated DBS distributors like EchoStar. Similarly, broadband satellite and wireless technologies will not likely become realities in the next few years. By contrast, AT&T and TCI assert in their Application that the proposed merger will enable them to complete their network and initiate services on a

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14 The Communications Act defines "advanced services" as "any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology." 47 U.S.C. § 706 (c).

15 *Advanced Services Order*, ¶ 52 (the term "xDSL" encompasses various types of digital subscriber lines, such as asymmetric digital subscriber lines and high-speed digital subscriber lines. *Id.*, ¶ 3, n. 5).

16 *See, e.g.*, the discussion in *Advanced Services NOI*, ¶ 10.

nationwide basis over the next three years – far in advance of almost all other efforts.[17] This deal will thus take an already dominant MVPD distributor, turn it into a distributor with virtually unlimited bandwidth by virtue of resources that it will exclusively control, and pit it against bandwidth-constrained distributors that are already handicapped in their efforts to compete. Instead of leveling the MVPD playing field in accordance with the Commission's mandate under the 1992 Cable Act, approval of this transaction without conditions would render that field an even more uneven precipice.

The plight to be faced by TCI's MVPD competitors is similar, though potentially even more acute, to that confronting on-line service providers. These providers have reason to be concerned that AT&T/TCI will combine its broadband access capabilities with its own Internet content, to the exclusion of alternative content sources. In the case of EchoStar and the MVPD market, the concern is in one sense even more serious, because TCI already distributes its own highly developed content (its programming packages) to an enormous subscriber base of millions (compared to the more limited penetration of AT&T and TCI in the area of Internet content). Thus, it need only bring on line its exclusively-controlled advanced services capacity to create a combined product against which it will be much more difficult to compete than today.

Indeed, the combined entity's intentions towards other content distributors were made clear just last week, when AT&T Chairman Michael Armstrong indicated that AT&T did not intend to allow access to its network on an equal footing. According to Mr. Armstrong, while some Internet service providers would be welcome, those carrying proprietary content

[17] *See* AT&T-TCI Applications at 37-42.

would be less welcome because of that content's competition with TCI's video services.[18] Such a position is consistent with the combined entity's self interest. Conduct informed by these intentions, however, would be an anti-competitive abuse of market power in light of the exclusive broadband resources that this transaction will create and that will compound TCI's already existing dominance in the MVPD market. Thus, the Commission should demand from the applicants a commitment to make this broadband bottleneck resource available to MVPD distributors for the purpose of complementing their own MVPD offerings on reasonable terms to be negotiated by the parties and prescribed by the Commission upon a failure to agree.

Nor would such a mechanism penalize AT&T and TCI for investing in a broadband network. AT&T-TCI will still reap large profits from its investments. Indeed, AT&T's Chairman stated recently that the company wants to carry other providers' offerings because it wants as much traffic and revenue as possible to offset high investment costs.[19] Thus, far from being unfair, a requirement of open access on reasonable terms will merely ensure that the profits the company will earn are competitive, not monopoly profits. While respecting the applicants' investment, such a condition will prevent the applicants from using their bottleneck control to augment their market power in the MVPD market, which would in the end limit consumer choice and harm the public interest.

In addition, the Commission should impose several restrictions on AT&T/TCI's packaging and marketing of MVPD services together with advanced and telephone services.

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[18] *Merger Partners Tell FCC That Deals Will Create Competition*, Communications Daily (Oct. 23, 1998).

[19] *Merger Partners Tell FCC That Deals Will Create Competition*, Communications Daily (Oct. 23, 1998).

Thus, the combined entity should be barred from imposing exclusivity requirements on consumers. It should be required to also make available to consumers MVPD, advanced and phone services on a separate, unbundled basis, thus allowing consumers to turn to other distributors for their MVPD needs. It should likewise be barred from imposing any direct or indirect restrictions that inhibit an AT&T/TCI customer from subscribing to another MVPD distributor or that provide the customer with built-in disincentives to do so (such as unwarranted price differentials between packaged and unbundled AT&T/TCI offerings, difficulty of integrating AT&T/TCI advanced services with another MVPD product, etc.).

II. THE COMMISSION SHOULD CLARIFY THAT LIBERTY MEDIA WILL REMAIN A VERTICALLY INTEGRATED PROGRAMMING VENDOR

The Commission should clarify that Liberty Media will remain a vertically integrated programming vendor for purposes of its program access rules. In their Application, AT&T and TCI embark on a slightly disconcerting effort to contend that the Liberty Media Group will be "a separately managed business group engaged in its current video programming businesses and any other business it elects to enter."[20] They cite various supposed indicia of Liberty Media's independence, including provisions of their agreement whereby: (1) Liberty Media's pre-merger board of directors will remain for seven years; (2) AT&T will remove such directors only for cause; (3) Liberty Media's relationships with other AT&T groups will be limited by contract; and (4) other AT&T groups will be allowed to compete with Liberty Media.[21] Whether or not these arguments portend an effort to evade application of the

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20 AT&T-TCI Applications at 13.

21 AT&T-TCI Applications at 12-13.

Commission's program access rules, the Commission need not even analyze these indicia to conclude that they are inadequate (for example, Liberty's current directors include Dr. Malone, who will become one of AT&T's largest shareholders, and the other directors will almost certainly hold AT&T shares as well). The Commission need only look to a single fact: that the Liberty Media Group will be 100% owned by the combined AT&T/TCI entity.

Under the Commission's current regulations, an investor in a cable programming entity is considered an affiliate of that entity if its interest is 5% or greater.[22] This affiliate standard plays a significant role in the Commission's efforts to ensure diversity in the cable industry generally as well as to deter discriminatory or unfair conduct by cable operators or programmers.[23] While the Commission has recently issued an NPRM to revisit its affiliate standard,[24] there can be no question but that a 100% ownership interest, irrespective of insulating factors, inevitably carries with it a degree of influence and control that goes to the heart of the Commission's competitive concerns.

The Commission should thus dispel any possibility that the applicants could successfully assert Liberty's independence as a defense in program access or other Commission proceedings. The Commission should also monitor carefully any subsequent transactions involving Liberty, particularly in light of Liberty's tortured history of spin-off and re-merger.

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22 47 C.F.R. §§ 76.501 and 76.1000(b).

23 *See generally* 47 C.F.R. §§ 76.1000-04, 76.1000(b), 76.501.

24 *In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Review of the Commission's Cable Attribution Rules*, 13 FCC Rcd. 12990 (1998).

III. CONCLUSION

In light of the foregoing, EchoStar requests that the Commission condition its approval of the proposed merger on an AT&T-TCI commitment to provide MVPD competitors with access to its broadband network on reasonable and non-discriminatory terms. Additionally, the Commission should clarify that, upon approval of the proposed merger, Liberty Media will continue to be a vertically integrated programming vendor for purposes of the Commission's rules.

Respectfully submitted,

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DECLARATION

I, David K. Moskowitz, hereby declare under penalty of perjury that the foregoing is true and correct.

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Executed on October 29, 1998

CERTIFICATE OF SERVICE

I, Colleen Sechrest, hereby certify that I have this 29th day of October, 1998, caused copies of the foregoing to be sent, via hand delivery, (or as otherwise indicated (*)), to the following persons:

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